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SUPREME COURT, U.S.

IN THE

SUPREME CURT OF THE UNITED STATES

STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 80-754
	)	
BOBBY JOE MCGEE,	)	
	)	
Respondent.	)	

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CETIORARI
TO THE SUPREME COURT OF MISSOURI

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STATE OF MISSOURI, Petitioner,	)	
vs.	)	No. 80-754
BOBBY JOE MCGEE, Respondent.	)	

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I

The Respondent here adopts the Statement of Questions Presented, Opinions Below, Jurisdictional Statement, Constitutional and Statutory Provisions Involved and Statement Of The Case set forth in Peitioner's Petition filed herein.

II

THE PETITION FOR WRIT OF CETIORARI SHOULD BE DENIED IN THIS CASE BECAUSE THE FACTS OF THE CASE DO NOT RELATE TO THE QUESTIONS PRESENTED BY PETITIONER.

In its Petition the State of Missouri has postulated five questions requiring requiring the attention of this Court, each of which relates to the issue of the propriety of prosecution and punishment for the offenses of Robbery and Armed Criminal Action in the face of the Fifth Amendment's prohibition against double jeopardy. Peitioner's Petition, pp. I, II.

However, this case concerns convictions for Assault With Intent To Do Great Bodily Harm Without Malice (S559.190 R.S.Mo. 1969 - Petitioner's Petition, A-25) and Armed Criminal Action (§559.225 R.S.Mo. 1976 Supp. Petitioner's Petition, A-26).

Respondent recognizes that the conviction rendered in the trial court on the offense of Armed Criminal Action was reversed outright by the state appellate court, with the citation of authority being to Sours vs. State, 593 S.W.2d 208 (Mo banc 1980) [referred to as Sours I in Petitioner's Petition]. That citation alone, however, does not bring this case within the ambit of the issues raised by Petitioner in this Court. To the contrary, the questions phrased by Petitionor reflect interest exclusively in dual Robbery and weapons prosecutions. The Respondent does not express any opinion as to the rectitude of the Petitioner's prayer with respect to those cases joined with this one in the joint Petition. As to this case, however, Respondent ought not be joined in the matter, since the circumstances of the case do not bring it within the issues to be litigated.

B

THE PETITION FOR WRIT OF CETIORARI SHOULD BE DENIED BECAUSE THE OPINION IN THE COURT BELOW THAT RESPONDENT'S RIGHT TO NOT BE PLACED TWICE IN JEOPARDY WAS CORRECT IN LIGHT OF THEPARTICULAR CIRCUMSTANCES OF THIS CASE.

In additic to the argument advanced above, Respondent suggests that the opinion rendered in the Missouri Court of Appeals (Petition, A-4 thru A-11) was a correct interpretation of the law of the State of Missouri and the Fifth Amendment to the Constitution of the United States, regardless of the issue of the propriety of dual prosecutions for robbery and armed criminal action presented in the companion cases in the matter now before the Court.

In order to clarify Respndent's position that this case is distinguished from the other matter joined by the Petition in this cause, and that the decision below was correct, some circumstances must be clarified. In Appendix A, herewith, Respondent has set forth the text of the Indictment upon which he was tried, as incorporated in the transcript of the record on appeal in the Missouri Court of Appeals, St. Louis District. Apendix B, herewith, sets forth, from the same source, the instructions given to the jury regarding the assault charges and armed criminal action. Likewise, Appendix C sets forth the verdicts rendered by the jury at trial.

A review of these materials demonstrates that Respondent was charged with assault "with a certain weapon, to wit: a knife" (A-1) and with armed criminal action by committing an assault with a knife. A-1, A-2. The Respondent

was convicted of the lesser included offense of Assault With Intent To Do Great Bodily Harm Without Malice under an instruction which required a finding that he "stabbed the victim. A-3. He was also convicted of armed criminal action under an instruction which required that the crime of assault "as submitted in Instruction No. 7" be "commited . . . with . . . a knife, by cutting and stabbing" the victim. A-5

Thus Respndent was convicted of two offenses which are virtually synonymous, to wit: assault by stabbing and stabbing with a knife. The Fifth Amendment to the Constitution of the United States, through the operation of the Fourteenth Amendment, and the common law of the State of Missouri prohibit subjecting a criminal defendant to being tried or punished twice for the same offense. State v. Toombs, 34 S.W.2d 61 (Mo. 1930). Missouri has adopted the separate offense rule of interpretation of the double jeopardy prohibition, under which the determination is based upon whether there is an identity of the offenses involved. State v. Treadway, 558 S.W.2d 646 (Mo. 1977). The prosecution "cannot split a single crime anl prosecute it in separate parts." State v. Parsons, 513 S.W.2d 430, 438 (Mo. 1974). Each offense must necessitate "Proof of an essential fact or element not required by the other." State v. Chambers, 524 S.W.2d 826, 829 (Mo. 1975).

"Identity of the offense does not mean formal technical, absolute identity, but substantial identity." State v. Toombs, supra., at 65, 66. The nomenclature of the offense is not decisive of the issue, rather it is the reliance upon the same criminal act which determines whether separate prosecution is permissible. Toombs at 66.

Application of these decisions and concepts to the present cause leads to the inevitable conclusion that the offenses at issue have such identity as to preclude dual prosecution and punishment. An act of force was an element of this assault, and that act of forcee was pleaded, proven and instructed upon exclusively as stabbing, an act for which the use of a knife is inherent. The offenses are inseparable. The proof required to convict Respondent of Armed Criminal Action was comprised exclusively of the proof necessary for the elements of the assault.

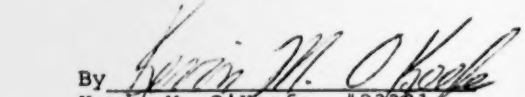
Accordingly, the opinion below as correct and neither the issue of the propriety of the Sours decision by the Missouri Supreme Court nor the question of dula robbery and weapons prosecutions are pertinent to the cause involving Respondent.

C

CONCLUSION

Respndent suggests, therefore, that the inclusion of his cause in the joint Petition is inappropriate and the Writ of Certiorari should be denied as to Respondent Bobby Joe McGee.

LANG & O'KEEFE, P.C.

By 
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241-7325

Attorneys for Respondent

APPENDIX A

INDICTMENT

Indictment was filed on the 27th day of January, 1977, as follows: (Caption and signature omitted)

"COUNT I

"THE GRAND JURORS OF THE STATE OF MISSOURI, within and for the body of the City of St. Louis, now here in Court, duly impaneled, sworn and charged, upon their oath present,

That BOBBY JOE McGEE on the 5th day of January, one thousand nine hundred and seventy-seven, at the City of St. Louis aforesaid, feloniously, willfully, on purpose, and of his malice aforethought did make an assault upon JO ANN BONNER, with a certain weapon, to-wit: a knife, a means likely to produce death or great bodily harm, and did then and there cut, stab and wound the said JO ANN BONNER, with the intent then and there to kill the said JO ANN BONNER, contrary to Section 559.180, Revised Statues of Misouri, in such case made and provided and against the peace and dignity of the State.

"COUNT II

"THE GRAND JURORS OF THE STATE OF MISSOURI, within and for the body of the City of St. Louis, now here in Court, duly impaneled, sworn and charged, upon their oath present further as follows:

"That BOBBY JOE McGEE, at the City of St. Louis aforesaid, on the 5th day of January, 1977, did willfully unlawfully and feloniously commit the crime ASSAULT WITH INTENT TO KILL WITH MALICE, a felony under the

laws of this State, with or through the use, assistance or aid of a dangerous and deadly weapon, to-wit: knife, contrary to Section 556.140, Revised Statutes of Missouri in such case made and provided, and against the peace and dignity of the State."

(FILED - JANUARY, 27, 1977.)

INSTRUCTION NO. 5

"As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

"First, that on January 5, 1977, in the City of St. Louis, State of Missouri, the defendant stabbed at Jo Anne Bonner, and

"Second, that he did so with malice aforethought--that is, intentionally and without just cause or excuse and after thinking about it beforehand for any lenght of time, and

"Third, that he did so with intent to kill Jo Anne Bonner.

then you will find the defendant guilty under Count I of assault with intent to kill with malice aforethought.

"However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty under Count I of that offense.

"If you do find the defendant guilty under Count I of assault with intent to kill with malice aforethought you will fix his punishment at imprisonment by the Department of Corrections for a term fixed by you, but not less than two years nor more than life imprisonment."

MAI-CR 6.22
Submitted by the State

INSTRUCTION NO. 7

If you do not find the defendant guilty under Count I of Assault With Intent To Kill With Malice Aforethought,

you must consider whether he is guilty under Count I of Assault With Intent To Do Great Bodily Harm Without Malice Aforethought.

"As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

"First, that on January 5, 1977, in the City of St. Louis, State of Missouri, the defendant stabbed at Jo Anne Bonner, and

"Second, that he did so with intent to do great bodily harm to Jo Anne Bonner,

then you will find the defendant guilty under Count I of assault with intent to do great bodily harm without malice aforethought.

"However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty under Count I of that offense.

"If you do find the defendant guilty under Count I of assault with intent to do great bodily harm without malice aforethought, you will fix his punishment

"1. By imprisonment by the Department of Corrections for a term fixed by you, but not less than two years nor more than five years, or

"2. By confienment in the St. Louis Medium Security Institution for a term fixed by you, but not less than six months nor more than one year, or

"3. By a fine of not less than $100, nor more than $1,000, or

"4. By both such fine and confinement in the St. Louis Medium Security Institution for a term fixed by you, but not less than three months nor more than one year."

MAI-CR 6.24
Submitted By the State

INSTRUCTION NO. 9

"As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

"First, that defendant committed the crime of Assault With Intent To Kill as submitted in Instruction No. 5, or Assault With Intent To Do Great Bodily Harm as submitted in Instruction No. 7, as charged in Count I, and

"Second, that he committed that crime with the use of a dangerous or deadly weapon, namely a knife, by cutting and stabbing at Jo Anne Bonner,

then you will find the defendant guilty under Count II of armed criminal action.

"However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, then you must find the defendant not guilty under Count II of that offense.

"If you do find the defendant guilty under Count II of armed criminal action you will fix his punishment at imprisonment by the Department of Corrections for

a term fixed by you, but not less than three years nor more than life imprisonment."

Not in MAI-CR
Submitted by the State

VERDICTS OF THE JURY

And, on the 8th day of December, 1977, the following verdicts were returned: (Caption and signature omitted)

"As to Count I, we, the jury, find the defendant guilty of Assault With Intent to do Great Bodily Harm Without Malice Aforethought as submitted in instruction No. 7:

"We fix punishment at five years.

Gerard A. Peters, Foreman."

and

"As to Count II, we, the jury, find the defendant guilty of Armed Criminal Action as submitted in instruction No. 9.

"We fix punishment at three years.

Gerard A. Peters, Foreman."

(FILED -DECEMBER 8, 1977.)

IN THE

SUPREME COURT OF THE UNITED STATES

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STATE OF MISSOURI, Petitioner,	)	
vs.	)	No. 80-754
BOBBY JOE MCGEE, Respondent.	)	

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now the Respondent, Bobby Joe McGee, by counsel, and hereby moves this Court for leave for Respondent to proceed in this Court in forma pauperis and, further, to grant leave to file a type-written brief in opposition to Petitioner's Petition For Writ of Cetiorari to the Supreme Court of Missouri. In support of his motion, Respondent informs the Court as follows:

1. The proceedings before this Court were initiated by the Petitioner, State of Missouri, and the relief sought by Petitioner is a Writ of Cetiorari from this Court to the Supreme Court of the State of Missouri to review an action in the state courts of Missouri wherein Respondent's conviction for the offenses of Assault and Armed Criminal Action were reversed on appeal.

2. Respondent has insufficient resources with which to bear the expenses of printing a brief and other

-

associated expenses with respect to the proceedings now before this Court.

3. Respondent is an employee of K & W Trucking Company Hamel, Illinois, is married and is the sole support for himself and his family. The expenses required for Respondent to defend himself against the charges which have given rise to the proceedings before this Court throughout the past several years have left Respondent virtually penniless.

WHEREFORE, Respondent prays that he be granted leave to proceed in forma pauperis in this Court and that this Court, further, grant leave for Respondent to file a brief in opposition to the Petition For Writ of Cetiorari in type-written form.

LANG & O'KEEFE, P.C.

By Kevin M. O'Keefe
Kevin M. O'Keefe
Attorneys for Respondent
706 Chestnut, Suite 411
St. Louis, Missouri 63101

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

Comes now Bobby Joe McGee, of lawful age, being duly sworn upon his oath, and deposes and states that he is the Respondent named in the foregoing Motion For Leave To Proceed In Forma Pauperis, that he has read and understood the contents thereof, that the facts and statements contained therein are true and correct according to his best information and belief and that Respondent has insufficient financial resources with which to pay the expenses associate with the proceedings now pending before the Supreme Court of the United States.

Bobby Joe McGee

Subscribed and sworn to before me this 17th day of January, 1981.

Kevin M. O'Keefe, Notary Public

My commission expires: 3-7-81

A copy of the foregoing has been mailed to Mr. John Ashcroft, Attorney General, State of Missouri, Supreme Court Building, Jefferson City, Missouri, 65102, this 17th day of January, 1981.